FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: COMMISSION SECRETARY

DATE: October 27, 2004

SUBJECT: COMMENT: DRAFT AO 2004-38

Transmitted herewith is a timely submitted comment by Marc E. Elias on behalf of the Democratic Senatorial Campaign Committee, and Judith L. Corley, on behalf ot the Democratic Congressional Campaign Committee, regarding the above-captioned matter.

Proposed Advisory Opinion 2004-38 is on the agenda for Thursday, October 28, 2004.

Attachment

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October 27, 2004

VIA FACSIMILE

The Honorable Bradley A. Smith
Chairman
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Advisory Opinion Request 2004-38

Dear Chairman Smith:

On behalf of our clients, the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee, we write to comment on the two draft advisory opinions submitted by the Office of General Counsel in connection with the above-referenced request. Because Draft A would substantively change Commission regulations now in place, relying on the erroneous premise that Congress had required the Commission to do so, the Commission should reject it in favor of Draft B. Any change to the amounts in which federal candidates may raise funds for recount expenses should be made through the rulemaking process, and not through consideration of the instant request.

When the Commission first wrote regulations in 1977 to implement the Federal Election Campaign Act, it crafted rules to exclude funds given with respect to a recount from the definition of "contribution," and thus from the limitations of the Act. Explanation and Justification of the Disclosure Regulations, H.R. Doc. No. 95-44, at 40 (1977).

As a result, under the Act as interpreted by the Commission, candidates became able to raise funds in unlimited amounts from individuals and other federally eligible sources to defray recount-related expenses. In writing these rules, the Commission reached the judgment that recounts, while "related to elections, are not Federal elections as defined by the Act", and that the contribution limits of 2 U.S.C. § 441a(a) thus should not apply to their financing. *Id.* The Commission applied this judgment in two subsequent advisory opinions, making it clear that funds given to a federal candidate to defray recount expenses were not "subject to the contribution limits of 2

U.S.C. §§ 441a." Advisory Opinion 1978-92. *Accord* Advisory Opinion 1998-26; *see also* Advisory Opinions 1990-23 and 1978-90.

Neither the Commission's 1977 Explanation and Justification nor its subsequent advisory opinions applied the "in connection with" standard to which the Office of General Counsel refers throughout Draft A. Indeed, as Draft A acknowledges, the Commission did not prohibit recount fundraising from foreign nationals until 1980. *See* Draft AO 2004-38A at 4 n.3 (citing 45 Fed. Reg. 15,080, 15102). *See also* Advisory Opinion 1978-92 (holding that recount fundraising was not "subject to the restrictions of 2 U.S.C. ... §§ 441e").

The Bipartisan Campaign Reform Act of 2002 ("BCRA") did not compel the Commission to prohibit federal candidates from raising unlimited funds to defray recount expenses. As Draft B correctly states, there is "no evidence that Congress intended through BCRA to implicitly overturn either the Commission's longstanding rules or advisory opinions on the treatment of recount funds." Draft AO 2004-38B at 5.

As a result, in its post-BCRA rulemakings, the Commission did not change the scope of the recount exemption. For example, when it rewrote the "contribution" and "expenditure" exemptions to conform them to BCRA, the Commission considered and rejected a request to eliminate the recount exemption:

> Another commenter advocated the complete, or at least partial, elimination of the exception to the definitions of "contribution" and "expenditure" for recounts and election contests, on the basis that recounts and election contests, which are not Federal elections as defined by the Act, *see generally* Federal Election Regulations, H.R. Doc. No. 44, 95th Cong., 1st Sess. at 40 (1977) (FEC E&J Compilation at 38, 42), "serve as an avenue for the use of soft money to influence federal elections," as evidenced by unregulated contributions used to pay for the 2000 Florida recount. This change is beyond the scope of this rulemaking dealing only with nonsubstantive changes, with the exception of the deletion of the office building or facility exception for national parties.

Reorganization of Regulations on "Contribution" and "Expenditure," 67 Fed. Reg. 50,582, 50,584 (2002).

Similarly, when the Commission made substantive changes to the rules in order to implement new section 441i(e), it did not curtail the recount exemption in any way. To the contrary, the Commission rejected entreaties to create a new exemption from the definition of "donation" for recount fundraising as unnecessary, saying: "The exemption for recounts is addressed in the Commission's current rules ..." Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,085 (2002).

Thus, Commission rules now permit federal candidates to raise funds for recounts in unlimited amounts from non-corporate, non-labor, non-foreign national sources. The law today provides: "A gift, subscription, loan, advance, or deposit of money or anything of value made with respect to a recount of the results of a Federal election, or an election contest concerning a federal election, is not a contribution except that the prohibitions of 11 C.F.R. 110.20 and part 114 apply." 11 C.F.R. § 100.91.

Before BCRA, the Commission interpreted this rule to mean that recount fundraising is not "subject to the contribution limits". Advisory Opinion 1978-92. After BCRA, the Commission was asked to alter this interpretation, but declined to do so. See 67 Fed. Reg. at 50,584. Indeed, the Commission expressed openness to the possibility that recount fundraising was exempt from the new BCRA restrictions on donations made to and received by federal candidates and national political party committees. 67 Fed. Reg. at 49,085.

The Commission may decide that revisions to these rules are appropriate to implement the restrictions and prohibitions of BCRA. Nonetheless, the proper forum for that decision is not the advisory opinion process, but a rulemaking. As the Commission has previously held, the agency "may not use advisory opinions as a substitute for rulemaking. Rulemaking is not simply the preferred method for filling in gaps in the FECA. It is the required method." Statement of Reasons on the Audits of Dole for President Committee, Inc. (Primary) et al. (June 24, 1999).

During the BCRA rulemakings, the Commission was asked twice to change the recount exemption, and yet it did not. Since the completion of the BCRA rulemakings in December 2002, the Commission has had nearly two years to revisit its decision, and yet it has not, even while considering several other rule changes.

For these reasons, we urge adoption of Draft B. As before, we appreciate the opportunity to comment on these matters.

Very truly yours,

Marc E. Elias
For the Democratic Senatorial
Campaign Committee

Judith L. Corley
For the Democratic Congressional
Campaign Committee

cc: Ms. Mary Dove
Lawrence M. Norton, Esq.